No. 12612

In the United States Court of Appeals for the Ninth Circuit

ERWIN P. WERNER, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

BRIEF FOR THE UNITED STATES, APPELLEE

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CITATIONS

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OPINION BELOW

A memorandum opinion of the district court filed May 26, 1950 (R. 24–30), has not been reported.

JURISDICTION

This is an appeal from an order entered by the district court on June 9, 1950 (R. 31) dismissing appellant's complaint for want of jurisdiction over the United States. The jurisdiction of the district court was sought to be invoked under 28 U. S. C. sec. 1346 (a). On June 12, 1950, appellant filed his notice of appeal (R. 32). The jurisdiction of this Court is invoked under 28 U. S. C. sec. 1291.

STATUTES INVOLVED

1. Title 28, U. S. C., sec. 2401 (a) provides as follows:

> (a) Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

2. Presidential Proclamation 2487 of May 27, 1941, 6 F. R. 2617, 55 Stat. 1647, 50 App., U. S. C., Note prec. sec. 1, p. 5636; Presidential Proclamation 2714 of December 31, 1946, 12 F. R. 1, 61 Stat. 1048, 50 App., U. S. C., sec. 601, p. 5728; Statement by the President of the United States on the issuing of Proclamation 2714 of December 31, 1946, CCH, War Law Service (2d ed.) paragraph 2516, p. 2223; and California Civil Code, sections 2267, 2300 and 2332, are set forth in the appendix, pp. 13–18, *infra*.

QUESTIONS PRESENTED

1. Whether the beneficiary of a trust may sue to reform a lease executed by trustees because of alleged mutual mistake more than six years after execution of the lease.

2. Whether a proclamation terminating hostilities prevented further renewal of a lease which provided that no renewal could extend "beyond six (6) months from the date of the termination of the unlimited emergency, as declared by the President of the United States on May 27th, 1941".

STATEMENT

This action involves a 40 acre tract of land which is part of the March Air Force Base Camp Haan Magazine Area located in Riverside County, California. A lease of the premises to the United States for military purposes was executed on February 1, 1943, by Mark L. Herron and Barbara W. Herron, who executed the lease as fee owners, that is, "for themselves, their heirs, executors, administrators, successors, and assigns" (R. 7–11). The lease provided for a rental of $25.00 per year and for renewal from year to year at that rental at the option of the Government "provided that no renewal thereof will extend the period of occupancy of the premises beyond six (6) months from the date of the termination of the unlimited emergency, as declared by the President of the United States on May 27th, 1941 (Proclamation 2487)" (R. 8–9). A supplemental agreement to dispense with notice of renewal was entered into between the same parties on May 31, 1943 (R. 15–17). This supplemental agreement was also executed by the Herrons "for themselves, their heirs, executors, administrators, successors, and assigns" and it also provided "that this lease shall in no event extend beyond six months from the date of the termination of the unlimited emergency, as declared by the President of the United States on May 27, 1941 (Proclamation)"[1] (R. 16).

[1] Though recitation of the proclamation number appears to have been inadvertently omitted at this point in the supplemental agreement, the proclamation is designated by number as well as date earlier in the supplemental agreement (R. 15).

On November 8, 1949, Erwin P. Werner, the appellant herein, filed a complaint alleging that at all times material he "has been, and now is, the legal owner in fee" of the premises involved and that Mark L. Herron and Barbara W. Herron held the premises in trust (R. 2–3). The complaint alleged that "by and through a mutual mistake of Plaintiff and Defendant, * * * said lease did not and does not now truly state or express the intention of the said parties" and sought reformation of the lease to have the language "that this lease shall in no event extend beyond six months from the date of the termination of the unlimited emergency, as declared by the President of the United States on May 27, 1941 (Proclamation 2487)" reformed to say "six months from the date of the cessation of actual hostilities with the said Axis nations, then at war, or the surrender of said Axis nations" (R. 4). The complaint also alleged that appellant did not discover the alleged mutual mistake until June 14, 1948 (R. 5). As a second cause of action the complaint alleged that the lease in question was terminated on August 14, 1945, "by reason of the said cessation of hostilities on the part of the said Axis nations"; that the fair market value of the land is $20,000.00 and that the use of the property was worth $2,500.00 per year. Accordingly, the complaint also contained a prayer for the reasonable value of the use and occupation of the property since August 14, 1945 (R. 6).

The United States filed a special appearance and a motion to dismiss the complaint on the grounds that the court did not have jurisdiction over the

United States and that the complaint fails to state a claim upon which relief can be granted (R. 18–20). The trial court found that appellant's right of action first accrued on February 1, 1943, the date of the execution of the lease between Mark L. Herron and Barbara W. Herron and the United States; that this action was commenced on November 8, 1949, which was more than six years following the date of accrual of such right of action, that appellant's claim is, therefore, barred by the provisions of 28 U. S. C., sec. 2401 (a) and hence the court did not have jurisdiction over the person of the defendant, United States of America. Accordingly, on June 9, 1950, an order was entered dismissing the complaint for want of jurisdiction over the United States (R. 31). On June 12, 1950, appellant filed his notice of appeal (R. 32).

ARGUMENT

I

The court lacked jurisdiction of this action because more than six years had elapsed since accrual of the alleged cause

The present action was filed November 8, 1949. More than six years had expired since the lease contract was executed on February 1, 1943. It is apparent that the six year limitation upon institution of such suits against the United States bars an action to reform that instrument unless facts are alleged which tolled the running of the statute. No such facts are alleged. The allegation of the complaint in this respect is simply (R. 5):

> That until the reconveyance to Plaintiff of said real property, as aforesaid, the terms and

> conditions of said lease agreement and mutual mistake were unknown to the Plaintiff herein, until June 14, 1948, when a copy of said lease was delivered to Plaintiff by said trustee. * * *

But the mere fact of ignorance prior to certain dates will not operate to toll the statute of limitations absent a showing that with diligence the fact would not have been discovered. *Wood* v. *Carpenter,* 101 U. S. 135, 140–141 (1879); *Norris* v. *Haggin,* 28 Fed. 275, 280–281 (C. C. Cal. 1886), affirmed 136 U. S. 386 (1890); *Teall* v. *Slaven,* 40 Fed. 774 (C. C. N. D. Cal. 1889); *Scafidi* v. *Western Loan & Bldg. Co.,* 72 C. A. 2d 550, 566, 165 P. 2d 260, 269–270 (1946); *Leahey* v. *Department of Water & Power,* 76 C. A. 2d 281, 287, 173 P. 2d 69, 73 (1946); *Phelps* v. *Grady,* 168 Cal. 73, 77–78, 141 Pac. 926, 927–928 (1914).

In the *Scafidi* case, supra, it is said:

> Our courts have repeatedly affirmed that mere ignorance of the facts constituting a cause of action on the part of a plaintiff does not prevent the running of the statute of limitations [citing cases]; and that "mere ignorance of the facts, * * * without some valid reason for ignorance, was of no consequence" (*Dennis* v. *Bint,* 122 Cal. 39, 44 [54 P. 378, 68 Am. S. Rep. 17] [citing authority]). Such, only, is the position in which plaintiffs' complaint places them in this case. The last cited cases are, in effect, a recognition of the prevailing rule that a failure to discover a cause of action does not, as in the case of its fraudulent concealment, suspend the running of the statute of limitations.

Thus in the case of *Goodfellow* v. *Barritt,* 130 C. A. 548, 20 P. 2d 740 (1933), which was cited by the court below (R. 30), the action was barred by limitations where the complaint filed seven years after the execution of the deed failed to show excuse for failure to discover the mistake within a reasonable time.

Here, the alleged mistake is in the permissible period for renewal of the lease term. As implied from appellant's allegation quoted above, such alleged mistake would become apparent merely from reading the instrument. The claim that appellant did not read the lease until the property was reconveyed to him in 1948 is no excuse because, as the trial court held (R. 29–30):

> In the case at bar the trustees who made the lease were plaintiff's agents [Cal. Civ. Code Secs. 2267, 2300], and their knowledge of the alleged mutual mistake upon which plaintiff's right of action is founded must be imputed to him. [Cal. Civ. Code Sec. 2332.] [2]

Moreover, the fact that the United States remained in possession after August 14, 1945, the time when appellant claims the lease was to terminate (R. 6) would itself put a reasonable person upon inquiry as to the authority under which the United States remained in possession.

Appellant does not directly challenge the holding of the court below that the trustees who made the

[2] It should be noted that there is no allegation that the parties to the instrument, i. e., the trustees and the United States were mistaken but only that the plaintiff and the United States were mistaken (R. 4).

lease were his agents and that their knowledge of the alleged mutual mistake upon which his right is founded must be imputed to him. He seeks, however, to avoid the result below by arguing that this is an action for rent and that relief by way of reformation of the contract is only incidental thereto. No such cause of action for rent is alleged. This is obvious from the fact that rather than seeking recovery of a contracted amount for rent, appellant seeks reasonable value of the use and occupation (R. 6). Indeed, while appellant's brief in this Court states (p. 4): "It will be noted that the defendant has paid no rent since the termination of the hostilities,"[3] the complaint will be searched in vain for any such allegation. Appellant's whole theory as stated in the complaint is that the lease terminated on August 14, 1945, and he seeks to recover reasonable value of the use and occupation since that date (R. 6). There is, therefore, no basis for the argument that reformation is sought merely as relief incidental to enforcement of a contractual obligation.

[3] Because appellant has gone outside of the record in stating that "the defendant has paid no rent since the termination of hostilities" (Br. 4), the Government feels obligated to say that while there is in fact rental due under the terms of the lease, it is because the appellant and his alleged trustees have refused to execute vouchers and other papers necessary for the payment of the rent reserved despite numerous attempts on the part of Government agents to get them to do so. This in no way alters the situation in the instant case. The fact remains that appellant's complaint does not allege a cause of action for rent in accordance with the terms of the lease.

The case was therefore properly dismissed because the alleged cause of action had accrued more than six years prior to filing of the suit.[4]

II

The lease cannot be construed as prohibiting renewals which extended six months beyond the cessation of hostilities

The original lease and the supplemental agreement are unambiguous. They provide that no renewal "will extend the period of occupancy of the premises beyond six (6) months from the date of the termination of the unlimited emergency, as declared by the President of the United States on May 27, 1941 (Proclamation 2487)" (R. 9, 15, 16). This unlimited emergency has not been terminated except as to certain specific statutory provisions listed in the Act of July 25, 1947, 61 Stat. 449.

Recognizing that the result he sought could not be achieved by any process of construction of the lease, appellant's complaint sought to substitute the language "six months from the date of the cessation of actual hostilities with the said Axis nations then at war, or the surrender of said Axis nations" (R. 4) for the lease provision above-quoted. Apparently now, however, he seeks to reach such result by a process of construction.

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[4] Since this is so, it is unnecessary to consider whether the alleged mistake should have been discovered by November 8, 1946, and would therefore be barred by the three year California limitation upon such suits, Cal. Code Civ. Proc. Secs. 335, 338.

Insofar as appellant relies on Presidential Proclamation 2714 of December 31, 1946, in his contention that such unlimited emergency has been terminated (R. 4–5, Br. 15),[5] he is going contrary to the language of the proclamation and the express declaration of the President of the United States who issued the proclamation. The proclamation itself states that "a state of war still exists" (*infra,* p. 15), and in his statement accompanying his proclamation of December 31, 1946, the President of the United States said, *inter alia* (CCH—War Law Service (2d ed.) paragraph 2516, p. 2223 [full text of statement printed in appendix, *infra,* pp. 16–17]):

> It should be noted that the proclamation does not terminate the states of emergency declared by President Roosevelt on September 8, 1939, and May 27, 1941. Nor does today's action have the effect of terminating the state of war itself. It terminates merely the period of hostilities. With respect to the termination of the national emergency and the state of war I shall make recommendations to the Congress in the near future.[6]

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[5] Though on pages 11 and 15 of his brief appellant refers to a Presidential Proclamation of December 3, 1945, it is believed apparent that he is referring to Presidential Proclamation 2714 issued December 31, 1946, which appellant sets out on pages 7–8 of his brief and which is referred to in his complaint (R. 4–5).

[6] Also on July 25, 1947, the President of the United States declared that "The emergencies declared by the President on September 8, 1939, and May 27, 1941, and the state of war continue to exist, * * *." See *Woods* v. *Miller Co.*, 333 U. S. 138, 140, footnote 3 (1948).

Similarly, the decision of this Court in the case of *Samuels* v. *United Seamen's Service,* 165 F. 2d 409, cited by appellant (Br. 13), reaffirms our position here. The lease in the *Samuels* case provided that its terms should "extend for a period of six (6) months from and after the cessation of hostilities in the present war with Japan" (165 F. 2d 409, 410). This Court held that hostilities, in fact, had ceased, saying (p. 411):

> It is true that certain war-time federal statutes were to be terminated "upon the cessation of hostilities, as proclaimed by the President." Such statutes were obviously operative until a formal Presidential proclamation. But the lease did not provide that the term should end concurrently with the termination of such statutes or upon any such Presidential proclamation. It is silent as to any such matters and we cannot infer that the parties, in executing the lease, deliberately intended to make formal Presidential or Congressional action a yardstick of time wherewith to measure the lease term. It would have been a very simple matter to so indicate had the parties desired to make this sort of official action the decisive test.

In the instant case the lease expressly adopted as a yardstick the termination by Congress or the President of the unlimited emergency declared in 1941. Since that event has not yet happened, we submit that the lease cannot be cut short by any process of construction.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the district court should be affirmed.

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OCTOBER 1950.

APPENDIX

Presidential Proclamation 2487 of May 21, 1941, 6 F. R. 2617, 55 Stat. 1647, 50 App. U. S. C. Note prec. sec. 1, p. 5636, is as follows:

PROCLAIMING THAT AN UNLIMITED NATIONAL EMERGENCY CONFRONTS THIS COUNTRY, WHICH REQUIRES THAT ITS MILITARY, NAVAL, AIR AND CIVILIAN DEFENSES BE PUT ON THE BASIS OF READINESS TO REPEL ANY AND ALL ACTS OR THREATS OF AGGRESSION DIRECTED TOWARD ANY PART OF THE WESTERN HEMISPHERE

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

WHEREAS on September 8, 1939 because of the outbreak of war in Europe a proclamation was issued declaring a limited national emergency and directing measures "for the purpose of strengthening our national defense within the limits of peacetime authorizations",

WHEREAS a succession of events makes plain that the objectives of the Axis belligerents in such war are not confined to those avowed at its commencement, but include overthrow throughout the world of existing democratic order, and a worldwide domination of peoples and economies through the destruction of all resistance on land and sea and in the air, AND

WHEREAS indifference on the part of the United States to the increasing menace would be perilous, and common prudence requires that for the security of this nation and of this hemisphere we should pass from peacetime

authorizations of military strength to such a basis as will enable us to cope instantly and decisively with any attempt at hostile encirclement of this hemisphere, or the establishment of any base for aggression against it, as well as to repel the threat of predatory incursion by foreign agents into our territory and society,

NOW, THEREFORE, I, FRANKLIN D. ROOSEVELT, President of the United States of America, do proclaim that an unlimited national emergency confronts this country, which requires that its military, naval, air and civilian defenses be put on the basis of readiness to repel any and all acts or threats of aggression directed toward any part of the Western Hemisphere.

I call upon all the loyal citizens engaged in production for defense to give precedence to the needs of the nation to the end that a system of government that makes private enterprise possible may survive.

I call upon all our loyal workmen as well as employers to merge their lesser differences in the larger effort to insure the survival of the only kind of government which recognizes the rights of labor or of capital.

I call upon loyal state and local leaders and officials to cooperate with the civilian defense agencies of the United States to assure our internal security against foreign directed subversion and to put every community in order for maximum productive effort and minimum of waste and unnecessary frictions.

I call upon all loyal citizens to place the nation's needs first in mind and in action to the end that we may mobilize and have ready for instant defensive use all of the physical powers, all of the moral strength and all of the material resources of this nation.

IN WITNESS WHEREOF I have hereunto set my hand and caused the seal of the United States of America to be affixed.

DONE at the City of Washington this twenty-seventh day of May, in the year of our Lord nineteen hundred and forty-one, and [SEAL] of the Independence of the United States of America the one hundred and sixty-fifth.

FRANKLIN D. ROOSEVELT.

By the President:
CORDELL HULL,
Secretary of State.

[No. 2487]

[F. R. Doc. 41–3808; Filed, May 28, 1941; 9:45 a. m.]

Presidential Proclamation 2714 of December 31, 1946, 12 F. R. 1, 61 Stat. 1048, 50 App. U. S. C. § 601, p. 5728, is as follows:

CESSATION OF HOSTILITIES OF WORLD WAR II

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

With God's help this nation and our allies, through sacrifice and devotion, courage and perseverance, wrung final and unconditional surrender from our enemies. Thereafter, we, together with the other United Nations, set about building a world in which justice shall replace force. With spirit, through faith, with a determination that there shall be no more wars of aggression calculated to enslave the peoples of the world and destroy their civilization, and with the guidance of Almighty Providence great gains have been made in translating military victory into permanent peace. Although

a state of war still exists, it is at this time possible to declare, and I find it to be in the public interest to declare, that hostilities have terminated.

NOW, THEREFORE, I, HARRY S. TRUMAN, President of the United States of America, do hereby proclaim the cessation of hostilities of World War II effective twelve o'clock noon, December 31, 1946.

IN WITNESS WHEREOF, I have hereunto set my hand and cause the seal of the United States of America to be affixed.

DONE at the City of Washington this 31st day of December in the year of our Lord nineteen hundred and forty [SEAL] six, and of the Independence of the United States of America the one hundred and seventy-first.

HARRY S. TRUMAN.

By the President:

JAMES F. BYRNES,
The Secretary of State.

[F. R. Doc. 46–22110; Filed, Dec. 31, 1946; 1:19 p. m.]

A statement by the President of the United States made on December 31, 1946, CCH-War Law Service (2d ed.) paragraph 2516, p. 2223, is as follows:

STATEMENT BY THE PRESIDENT

I have today issued a proclamation terminating the period of hostilities of World War II, as of 12 o'clock noon today, December 31, 1946.

Under the law, a number of war and emergency statutes cease to be effective upon the issuance of this proclamation. It is my belief that the time has come when such a declaration

can properly be made, and that it is in the public interest to make it. Most of the powers affected by the proclamation need no longer be exercised by the executive branch of the Government. This is entirely in keeping with the policies which I have consistently followed, in an effort to bring our economy and our government back to a peacetime basis as quickly as possible.

The proclamation terminates government powers under some 20 statutes immediately upon its issuance. It terminates government powers under some 33 others at a later date, generally at the end of 6 months from the date of the proclamation. This follows as a result of provisions made by the Congress when the legislation was originally passed. In a few instances the statutes affected by the Proclamation give the government certain powers which in my opinion are desirable in peacetime, or for the remainder of the period of reconversion. In these instances, recommendations will be made to the Congress for additional legislation.

It should be noted that the proclamation does not terminate the states of emergency declared by President Roosevelt on September 8, 1939, and May 27, 1941. Nor does today's action have the effect of terminating the state of war itself. It terminates merely the period of hostilities. With respect to the termination of the national emergency and the state of war I shall make recommendations to the Congress in the near future.

December 31, 1946

California Civil Code § 2267 provides as follows:

Sec. 2267. Trustee's powers as agent. A trustee is a general agent for the trust property. His authority is such as is conferred upon him by the declaration of trust and by this chapter, and none other. His acts, within the scope of

his authority, bind the trust property to the same extent as the acts of an agent bind his principal.

California Civil Code § 2300 provides as follows:

SEC. 2300. Ostensible agency. An agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him.

California Civil Code § 2332 provides as follows:

SEC. 2332. Notice to agent, when notice to principal. As against a principal, both principal and agent are deemed to have notice of whatever either has notice of, and ought, in good faith and the exercise of ordinary care and diligence, to communicate to the other.

U. S. GOVERNMENT PRINTING OFFICE: 1950